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IN THE
COURT OF APPEALS OF INDIANA

ANWAR J. JONES,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0609-CR-813
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patricia Gifford, Judge
Cause No. 49G04-0502-MR-24794

June 15, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Anwar Jones appeals the sentence imposed following his plea of guilty to reckless homicide, a class C felony.[1]

We affirm.

ISSUE

Whether the trial court erred in sentencing Jones.

FACTS

Following the shooting and death of Ricky Ayres on February 9, 2005, the State charged Jones with murder; pointing a firearm at another person, as a class D felony; and carrying a handgun without a license, a class A misdemeanor. The State filed the charges on February 15, 2005. A jury trial commenced on August 7, 2006. On August 8, 2006, Jones and the State filed a plea agreement, whereby Jones agreed to plead guilty to reckless homicide as a lesser-included offense of murder, and the State agreed to dismiss all the remaining charges. The plea agreement left sentencing within the trial court's discretion.

The trial court accepted the terms of the plea agreement and ordered a pre-sentence investigation report ("PSI"). According to the PSI, Jones had the following juvenile adjudications: disorderly conduct in June of 1997; resisting law enforcement in November of 1997; and resisting law enforcement in November of 1999. The PSI also revealed that Jones had been arrested for and/or charged with the following: battery in

[1] Ind. Code § 35-42-1-5.

1997; battery, curfew violation, auto theft, resisting law enforcement, carrying a handgun without a license, and three separate incidents of disorderly conduct in 1999; criminal trespass and two incidents of possessing marijuana in 2001; pointing a firearm and possession of marijuana in 2002; and dealing in marijuana and possession of marijuana in 2004.

The trial court held a sentencing hearing on August 23, 2006. Jones presented several mitigating circumstances for the trial court's consideration: 1) his guilty plea; 2) he was likely to respond affirmatively to probation and was unlikely to reoffend; 3) he had no prior felony convictions; 4) imprisonment would result in undue hardship to his family; and 5) he had the support of his family. The State presented the following aggravating circumstances: 1) Jones' criminal history; 2) that Jones had had "the benefit of probation and it's done nothing to stop his criminal history"; 3) the nature and circumstances of the crime; and 4) criminal activity despite family support. (Tr. 21).

The trial court found "as aggravating circumstances the length of [Jones'] prior criminal history, including an escalating pattern of violence." (Tr. 24). The trial court found Jones' family support and obligations to be mitigating circumstances. Finding that the aggravators outweighed the mitigators, the trial court sentenced Jones to eight years in the Department of Correction.

Additional facts will be provided as necessary.

DECISION

Jones argues the trial court erred in sentencing him.[2] Specifically, Jones asserts that the trial court improperly found and weighed aggravating and mitigating circumstances; and improperly ruled that his sentence could not be suspended. Jones also contends that his sentence is inappropriate pursuant to Indiana Appellate Rule 7(B).

1. Aggravating and Mitigating Circumstances

We review a trial court's sentencing decision for an abuse of discretion. *Edmonds v. State*, 840 N.E.2d 456, 461 (Ind. Ct. App. 2006), *trans. denied*, *cert. denied*, 127 S. Ct. 497 (2006). "The trial court's sentencing discretion includes determining whether to increase the sentence, to impose consecutive sentences on multiple convictions, or both." *Id.* In order for a trial court to impose enhanced or consecutive sentences, it must 1) identify the significant aggravating and mitigating circumstances; 2) relate the specific facts and reasons that the trial court found those to be aggravating and mitigating

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[2] We note that Jones questions whether the trial court applied the incorrect sentencing scheme. Jones contends that the trial court may have applied the advisory sentencing scheme in effect when he was sentenced rather than the presumptive sentencing scheme in effect when he committed the offense. The confusion regarding which scheme the trial court applied arises from the trial court's statement when addressing the penalty for a class C felony: "It's a four year advisory sentence to which the Court could add four years for aggravating circumstances or subtract two years for mitigating circumstances . . . ." (Tr. 3-4).

Subsequent to the date of Jones' offense and prior to the date of his sentencing, the legislature amended Indiana Code section 35-50-2-6, which set forth the sentencing range for a class C felony, to provide for an "advisory" rather than "presumptive" sentence. *See* P.L. 71-2005, § 7 (eff. Apr. 25, 2005). We agree, and the State does not contest, that the change from presumptive to advisory sentences should not be applied retroactively because the change alters a defendant's right to "have aggravating circumstances submitted to a jury and found beyond a reasonable doubt before a presumptive sentence is enhanced." *Weaver v. State*, 845 N.E.2d 1066, 1071 (Ind. Ct. App. 2006), *trans. denied*. Thus, we shall analyze the propriety of Jones' sentence under the presumptive regime.

At the time of Jones' offense, the statutory sentencing range for a class C felony was two to eight years, with the presumptive sentence being a fixed term of four years with not more than four years added for aggravating circumstances. I.C. § 35-50-2-6 (amended 2005). In this case, the trial court sentenced Jones to eight years.

circumstances; and 3) demonstrate that the trial court has balanced the aggravating and mitigating circumstances. *Bostick v. State*, 804 N.E.2d 218, 225 (Ind. Ct. App. 2004).

a. *Aggravating circumstances*

Jones argues the trial court "failed to require aggravating circumstances to be proved beyond a reasonable doubt." Jones' Br. 2. We disagree.

Jones' plea agreement with the State included the following stipulation:

> The defendant acknowledges that the defendant has a right, pursuant to the Sixth Amendment to the United States Constitution and Article I, Section 13 of the Indiana Constitution, to have a jury determine, by proof beyond a reasonable doubt, the existence of any fact or aggravating circumstance that would allow the Court to impose a sentence in excess of the statutory presumptive sentence and to have the State of Indiana provide written notification to the defendant of any such fact or aggravating circumstance. The defendant hereby WAIVES such rights and requests that the Judge of this Court make the determination of the existence of any aggravating and/or mitigating circumstances and impose sentence, after considering the presentence investigation report and any appropriate evidence and argument presented at the sentencing hearing.

(App. 80). By accepting the plea agreement, Jones has waived any argument that any aggravating circumstances found must have been proven beyond a reasonable doubt. *See Strong v. State*, 820 N.E.2d 688, 690 (Ind. Ct. App. 2005) (finding that defendants may waive their rights to have aggravators proven beyond a reasonable doubt by consenting to judicial fact finding), *trans. denied*.

Jones further argues that the trial court improperly found his criminal history to be an aggravating circumstance. Specifically, Jones asserts the trial court abused its discretion in considering Jones' record of arrests and charges.

> A record of arrest, without more, does not establish the historical fact that a defendant committed a criminal offense and may not be properly

> considered as evidence of criminal history. However, a record of arrest, particularly a lengthy one, may reveal that a defendant has not been deterred even after having been subject to the police authority of the State. Such information may be relevant to the trial court's assessment of the defendant's character in terms of the risk that he will commit another crime.

Cotto v. State, 829 N.E.2d 520, 526 (Ind. 2005) (citations omitted).

Regarding Jones' criminal history, the trial court considered the following:

> I guess my concern is that having [] strong family support previously didn't seem to keep you out of trouble. . . . I also am concerned by the number of charges that have been filed against you that involve acts of violence back when you were a juvenile, beginning with battery [sic], then in a resisting law enforcement, both of which were convictions, then . . . followed by a disorderly conduct and again a resisting law enforcement. You were charged then with battery and that was dismissed, you were charged with disorderly conduct and that was dismissed, and then you got charged with possession of marijuana and it got waived and I guess it finally got dismissed. However, as an adult you were charged with auto theft, carrying a handgun without a license, disorderly conduct, all of which were not filed, and now we finally have escalated up to . . . pointing a firearm that was dismissed, and then you've got the dealing in marijuana that's still pending . . . . So it would appear from reading your record that you have just begun to escalate along your crimes. . . . [Y]ou've expressed in your writings here that you want to get on with your life and get an education, and I think that's wonderful. But at some point we have to get you stopped from this escalating violence, and I don't know what the answer is.

(Tr. 22-24).

The trial court properly considered Jones' arrest record as an indication that Jones will likely reoffend. *See Cotto v. State*, 829 N.E.2d 520, 526 (Ind. 2005). Furthermore, Jones' lengthy record of arrest, dating from 1997 to 2005, and including prior firearm-related arrests, supports the trial court's finding that Jones is at a substantial risk of committing another crime.

b. *Mitigating circumstances*

Jones argues the trial court overlooked several significant mitigating circumstances. A trial court must consider all evidence of mitigating circumstances presented by a defendant. *Sipple v. State*, 788 N.E.2d 473, 480 (Ind. Ct. App. 2003), *trans. denied*. The finding of mitigating circumstances, however, rests within the sound discretion of the trial court. *Id.* The failure to find a mitigating circumstance clearly supported by the record may imply that the trial court overlooked the circumstance. *Id.*

The trial court, however, is not obligated to consider "alleged mitigating factors that are highly disputable in nature, weight or significance." *Id.* Furthermore, the trial court need not agree with the defendant as to the weight or value to be given to proffered mitigating circumstances. *Id.* The trial court need enumerate only those mitigating circumstances it finds to be significant. *Ross v. State*, 835 N.E.2d 1090, 1093 (Ind. Ct. App. 2005), *trans. denied*.

Jones asserts that the trial court should have considered his age—twenty-one years-old—as a mitigating circumstance. We disagree as "[a]ge is neither a statutory nor a per se mitigating factor." *Monegan v. State*, 756 N.E.2d 499, 504 (Ind. 2001). Furthermore, twenty-one years of age is well past the age that our courts have afforded special consideration. *See Corcoran v. State*, 774 N.E.2d 495, 500 (Ind. 2002) (holding that twenty-two was "well past the age of sixteen where the law requires special treatment"), *reh'g denied*, *habeas corpus granted in part on other grounds*, No. 3:05-CV-389, 2007 WL 1068102 (N.D. Ind. Apr. 9, 2007).

Jones also asserts the trial court should have considered other mitigating circumstances, namely: his guilty plea, lack of significant criminal history, the

circumstances were unlikely to recur, the support he has from his family, and the hardship to his family caused by his incarceration. Jones, however, provides no authority in support of these mitigating circumstances. Thus, these issues are waived.[3] *See Bonner v. State*, 776 N.E.2d 1244, 1251 (Ind. Ct. App. 2002) (stating that a party waives any issue raised on appeal where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the record), *trans. denied*.

Furthermore, Jones has failed to show that the proffered mitigating circumstances are both significant and clearly supported by the record, and a trial court is not obligated to weigh or credit proffered mitigating circumstances the same as the defendant requests. *See Fitzgerald v. State*, 805 N.E.2d 857, 862 (Ind. Ct. App. 2004). Thus, we find no abuse of discretion in finding and weighing the relevant aggravating and mitigating circumstances.

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[3] Waiver notwithstanding, we acknowledge that the trial court did not specifically identify Jones' guilty plea as a mitigating circumstance. "Our courts have long held that a defendant who pleads guilty deserves to have some mitigating weight extended to the guilty plea in return." *Cotto*, 829 N.E.2d at 525. A guilty plea, however, is not necessarily a significant mitigating factor. *Id.*

Here, Jones received a significant benefit from his guilty plea. Originally charged with murder, Jones pled guilty to reckless homicide, a class C felony, and the State dropped the remaining charges. Furthermore, the State did not receive a benefit since Jones' guilty plea did not save the State the expense and time of a trial. Thus, we do not find that the trial court abused its discretion in failing to identify Jones' guilty plea as a mitigating circumstances as we cannot say that it was significant. *See Gray v. State*, 790 N.E.2d 174, 177-80 (Ind. Ct. App. 2003) (finding guilty plea not a significant mitigating circumstance where the defendant, not the State, reaped substantial benefit and it did not save the court's time).

As to a defendant's relative lack of criminal history and never having violated probation, a trial court need not give significant weight to a defendant's lack of criminal history. *Bunch v. State*, 697 N.E.2d 1255, 1258 (Ind. 1998), *reh'g denied*. This is especially so when a defendant's record, while felony-free, is blemished. *See Bostick v. State*, 804 N.E.2d 218, 225 (Ind. Ct. App. 2004).

Finally, regarding Jones' assertion that the trial court failed to consider that his family "came to court to show support" and that his imprisonment would cause his family undue hardship, the record clearly establishes that the trial court found Jones' "family support" and "family obligations" to be mitigating circumstances. (Tr. 24).

2. Suspended Sentence

Jones argues that the trial court "incorrectly assumed the sentence for his crime could not be suspended" pursuant to Indiana Code section 35-50-2-2, which "allows sentences for Class C felonies to be suspended if the defendant had never been convicted for a felony."[4] Jones' Br. 8.

In support, Jones cites to the following colloquy:

> THE COURT: Did Ms. Hall tell you what the law provides as a penalty for a C felony?
>
> DEFENDANT: Yes, ma'am.
>
> THE COURT: And what is that?
>
> DEFENDANT: It's two to eight years.
>
> THE COURT: [T]he Court . . . cannot suspend any of your sentence if you've had a prior felony conviction within the last seven years.

(Tr. 3-4). Jones also cites to the PSI, which advised: "Under I.C. 35-50-2-2, it appears that the Instant Offense is non-suspendable." (PSI 9).

We find Jones' argument to be without merit. The trial court did not state that it could not suspend Jones' sentence. Rather, it stated that it could not suspend any of his sentence "if [he had] had a prior felony conviction within the last seven years." (Tr. 4) (emphasis added). We presume that trial courts know and follow the law, and Jones has not overcome this presumption. *See Garrett v. State*, 756 N.E.2d 523, 535 (Ind. Ct. App. 2001), *trans. denied*.

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[4] Indiana Code section 35-50-2-2(a) provides that a "court may suspend any part of a sentence for a felony, except as provided in this section or in section 2.1 of this chapter."

3. Inappropriate Sentence

Jones also argues that his sentence is inappropriate in light of the nature of his offense and his character. We may revise a sentence authorized by statute if it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). "When considering the appropriateness of the sentence for the crime committed, the sentencing court should focus initially on the presumptive sentence." *Rose v. State*, 810 N.E.2d 361, 368 (Ind. Ct. App. 2004). The trial court may deviate from the presumptive sentence based on general sentencing considerations contained in Indiana Code section 35-38-1-7.1, as well as aggravating and mitigating circumstances. *Id*. In this case, Jones received the maximum sentence of eight years. "In general, the maximum possible sentences should be reserved for the worst offenders and offenses." *Newsome v. State*, 797 N.E.2d 293, 302 (Ind. Ct. App. 2003), *trans. denied*.

Our review of the nature of the offense reveals that Jones and Ayres were talking when, for no apparent reason, Jones brandished and discharged a handgun, killing Ayres. As to Jones' character, Jones has three prior convictions and several arrests for escalating crimes of violence, indicating no deterrence from criminal activity. Based upon all of the above, we find that both the nature of the offense and the character of the offender support an enhanced sentence.

Affirmed.

KIRSCH, J., and MATHIAS, J., concur.